

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KENE XAYPANYA

Claimant

VS.

HARPER TRUCKS, INC.

Respondent

AND

ZURICH U.S. INSURANCE

Insurance Carrier

Docket No. 1,013,010

ORDER

Respondent and its insurance carrier request the Appeals Board (Board) review of the October 14, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ found that claimant sustained a compensable injury on August 7, 2003, his last date of work for respondent. The ALJ further found claimant had "just cause" for failing to provide respondent with notice within 10 days of his alleged injury. Thus, the ALJ concluded the written notice served upon respondent on September 8, 2003, was within 75 days of the date of the accident. Accordingly, claimant was granted benefits as requested.

The respondent requests review of this decision, alleging the ALJ exceeded his jurisdiction in awarding claimant benefits and further alleging claimant failed, as a matter of law, to establish "just cause" as that term is used in K.S.A. 44-520 and as defined by the Board.

Claimant argues the ALJ's findings sufficiently establish "just cause" for claimant's failure to notify respondent of his upper extremity problems before September 8, 2003. Claimant requests the ALJ's Order be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is a 63-year-old Laotian man who alleges bilateral ulnar nerve entrapment across his elbows, with left carpal tunnel syndrome, arising from his repetitive work duties with respondent. Claimant's last date of work for respondent was August 7, 2003, and there is no apparent dispute between the parties as to the existence and causation of his injuries nor that the accident date is, consistent with Kansas law, August 7, 2003. The sole dispute stems from the timeliness of claimant's notice to respondent of this particular condition. In particular, whether claimant has established "just cause" as that term is used in K.S.A. 44-520.

Claimant admits that he did not tell any of his supervisors of the problems he was experiencing with his upper extremities before his last date of work although he appears to have been aware that these symptoms were work-related. Claimant testified that he was concerned about losing his job, an occurrence that came to pass on August 7, 2003, due to an economic layoff. Moreover, claimant testified that he had, over his years in respondent's employ, suffered various injuries and knew of the importance of informing his employer of accidental injuries. In fact, claimant had sustained a back injury in 1999 and had, according to representations of respondent's own counsel, notified his employer of that particular injury. That injury is the focus of a separate claim. Nonetheless, respondent points to claimant's conduct with respect to that injury as a tacit admission that he was well aware that timely notice of work-related injuries is critically important. Claimant maintains that his back injury was significant enough that he could not ignore his symptoms and that is why he reported it to his employer. As for his failure to report his bilateral hand and arm complaints, he indicated that he was concerned about telling his employer about yet another injury, thus jeopardizing his job. He believed he could ignore those problems and continue to work but once he was laid off on August 7, 2003, he no longer had a job and his reason for withholding his claim was gone.

K.S.A. 44-520 requires a claimant provide notice of a work-related accident to his or her employer within 10 days of the date of the accident. The notice must state the time, place and particulars of the accident so as to alert the respondent to the possible work connection to the injury and the potential for a claim. See e.g., *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978). That same statute permits the reporting period to be extended when the employee has "just cause" for not reporting the accident in a timely manner.

Although not intended as an exhaustive list, some of the factors to consider in determining whether “just cause” exists are:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained either an accident or an injury on the job.
- (3) The nature and history of claimant’s symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-12-2.

When just cause is an issue, the above factors should be considered but each case must be determined on its own facts. The Board finds persuasive evidence establishing just cause for failing to report the accident within the 10-day period contained in K.S.A. 44-520.

Claimant sustained a repetitive-use type injury which he concluded, as early as March or April of 2003, was attributable to his work activities. At the same time, he was also experiencing back problems which stemmed from an earlier injury. According to him, the complaints relative to his back were far worse than the subtle pain, discomfort and tingling he was having in his upper extremities. He felt he could live with the problems in his hands and arms and still continue to work. Moreover, claimant was concerned about losing his job if he reported yet another physical problem although he admits he knew he was to report injuries to the appropriate individual. It is worth noting there is no evidence in the record that indicates whether respondent posted the notice required by K.A.R. 51-12-2.

After considering the record as a whole, the Board finds that the ALJ did not err in finding claimant had established “just cause” for reporting his injury on September 8, 2003, more than 10 days after the date of accident but within the 75-day period set forth in K.S.A. 44-520. Claimant’s fear of losing his job was well-founded and ultimately credible under these facts and circumstances. The nature of his injury, that of a repetitive injury, as well as the slow onset of the symptoms claimant describes both justify a reasonable delay in reporting. The fact that he knew of the reporting requirements and had sustained other injuries does not presumptively prohibit the application of the “just cause” concept to the instant facts. Claimant was merely trying to continue working so that he could support his family. The evidence strongly suggests that to the extent claimant could continue to ignore his upper extremity complaints in favor of working, he would have continued to do so.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated October 14, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Claimant
Gary K. Albin, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director